

The Honorable Robert S. Lasnik  
Oral Argument Requested

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

LUCRETIA JAMES,

Defendant.

2:08-cr-00244-RLS-3

REPLY TO GOVERNMENT'S  
RESPONSE TO CBC'S MOTION  
IN INTERVENE AND UNSEAL  
SENTENCING RECORDS

Note on Motion Calendar: October  
2, 2009

The U.S. Attorney has not met her very high burden under the First Amendment or the common law of showing that the documents should remain under seal. The government proffers the affidavit of U.S. Drug Enforcement Agent Kasey Kanekoa who "believe[s]" that unsealing "certain documents would seriously hinder" the investigation and "may identify" and put "some" codefendants in danger. Affidavit of Special Agent Kasey K. Kanekoa ("Kanekoa Dec.") ¶ 13. These vague, speculative statements are clearly insufficient. *See Oregonian Publishing Co. v. United States Dist. Court*, 920 F.2d 1462, 1467 (9th Cir. 1990) (finding a lack of evidentiary support based on a letter that failed to present facts demonstrating any danger to the individual or his family). The government's claim that secrecy is needed to protect Ms. James should be viewed with skepticism because her personal information already has been filed publicly. For instance,

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1 the Second Supplement to Presentence Report, Docket # 32, includes information about  
2 Ms. James being a mother and her work history.

3 More importantly, Ms. Kanekoa's declaration acknowledges that unsealing some of  
4 the information would not hinder the government's investigation or put co-defendants in  
5 danger. Any sealing order must consider and use less restrictive alternatives that do not  
6 completely frustrate the public's First Amendment and common law rights of access. *See,*  
7 *e.g., Press-Enterprise I*, 464 U.S. at 512 (concluding that sealing order should be limited  
8 "to information that was actually sensitive," i.e., "only such parts of the transcript as  
9 necessary to preserve the anonymity of the individuals sought to be protected"). As the  
10 Third Circuit explained: "If an alternative would serve the interest well and intrude less on  
11 First Amendment values, a denial of public access cannot stand." *United States v. A.D.*, 28  
12 F.3d 1353, 1357 (3d Cir. 1994). If the Court finds that CBC has met its burden with respect  
13 to some of the information filed under seal, the Court should accept the government's offer  
14 that redacted documents be provided to CBC. Government response at 8.

15 The government is also submitting two affidavits for the Court's *in camera* review.  
16 Government's response at 7. CBC urges the Court to reject secret communications. *See*  
17 *U.S. v. Edwards*, 101 F.3d 17 (2d Cir. 1996) (holding that refusing to seal two letters from  
18 defendant to judge was not error). CBC should have access to those documents, as they  
19 are part of the Court's decision-making with respect to the present motion to unseal.  
20 "Public confidence cannot long be maintained where important judicial decisions are made  
21 behind closed doors and then announced in conclusive terms to the public, with the record  
22 supporting the court's decision sealed from public view." *Gannett Co. v. DePasquale*, 443  
23 U.S. 368, 429 (1979) (citation omitted). In any event, the government's attempt to keep  
24 these affidavits secret should be scrutinized under the same rigorous standards as other  
25 documents filed under seal in the present proceeding.

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1           The government argues that there are other sources of information available to  
 2   CBC. This argument improperly places the burden on the public or press to demonstrate a  
 3   need for openness, in violation of the First Amendment. *Oregonian*, 920 F.2d. at 1466.  
 4   The Court should similarly reject the government's argument that the CBC has a  
 5   "commercial purpose." The United States Supreme Court has rejected the claim that the  
 6   media has a "commercial purpose" where, as here, the purpose is to communicate  
 7   information. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (finding that  
 8   even a paid advertisement was not commercial activity where it "communicated  
 9   information, expressed opinion, recited grievances, protested claimed abuses, and sought  
 10   financial support on behalf of a movement" and finding it "immaterial" that the newspaper  
 11   was paid for the advertisement or that the newspapers were sold).

12           With respect to the government's opposition to intervention, at least one court here  
 13   in the Western District of Washington has allowed Canadian media to intervene to  
 14   challenge the right of access to court records and proceedings. *See In re Thow*, 392 B.R.  
 15   860 (2007). Further, a federal court has specifically recognized that the First Amendment  
 16   applies to a member of the foreign media. *See Times Newspapers Ltd. v. McDonnell*  
 17   *Douglas Corp.*, 387 F. Supp. 189, 192 (1974). The government has provided no cases that  
 18   reach a different result in a First Amendment context. The Canadian media have as much  
 19   an interest in this proceeding as the American media. The criminal charges stem from an  
 20   investigation of a drug-smuggling ring operating out of both the United States and Canada.  
 21   *See, e.g., Kanekoa Dec.* ¶ 2, 3, 5. Two individuals are fugitives in Canada. *Id.* ¶ 4.

22           Finally, Local Civil Rule 5(b) authorizes services by electronic means when a paper  
 23   is properly filed in accordance with the court's ECF system. CBC filed its documents  
 24   through with ECF, and therefore service was proper.

25           For these reasons, the Court should grant CBC's motion to intervene and to unseal  
 26   the plea agreement and sentencing documents filed by the U.S. Attorney's Office.

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2 DATED this 2<sup>nd</sup> day of October, 2009.

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